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In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF EXXON CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF GULF OIL CORPORATION

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INTEREST OF AMICUS CURIAE EXXON CORPORATION

Gulf Oil Corporation (Gulf) has filed a Petition for Writ of Certiorari in the instant matter seeking review of questions arising out of the application of the Louisiana Oilfield Indemnity Act (LOIA) La.Rev.Stat.Ann. §9:2780 (West 1985), to contracts for services to be performed on the Outer Continental Shelf (OCS). Exxon Corporation (Exxon) contracts with an extensive number of oilfield contractors for the performance of services in connection with the exploration for and production of oil and gas on the OCS. Thus, Exxon is substantially affected by the LOIA.

During its 1981 Session, the Louisiana Legislature pased Act 427, which added to the Louisiana Revised Statutes a section rendering invalid certain indemnity agreements relating to the development, exploration and production of minerals. Having erroneously perceived that "an inequity is foisted on certain contractors and their employees" by indemnity agreements pertaining to the drilling for oil, gas, water, or minerals, the Legislature declared null and void and as against public policy any agreement requiring defense or indemnification for loss or liability for damages from death or bodily injury to persons caused by the sole or concurrent negligence or fault (strict liability) of the indemnitee. La.Rev.Stat.Ann.§9:2780 (A),(B).

The term "agreement" as defined by subsection C of the LOIA is very broad, covering any written or oral agreement or understanding concerning exploration, development, production, and/or services or any agreement collateral thereto. Thus, the LOIA prohibits agreements

which require waivers of subrogation, additional named insured endorsements, or any other form of insurance protection not specifically authorized by the statute. A traditional business practice in the offshore oil industry has been for oilfield operators and their service contractors to negotiate and agree upon the apportionment of liability for negligence. This has commonly been accomplished by the use of an indemnity agreement in the master service contract. A standard provision of some service contracts requires the service company to provide proof of insurance containing a contractual liability endorsement and a waiver of rights of subrogation, or to name the oil company as an additional insured on the contractor's liability policies. The LOIA, in effect, prohibits the voluntary apportionment of risk between private parties. The Act applies to master service contracts which number in the hundreds, if not thousands, to be performed within the State of Louisiana, as well as in the Gulf of Mexico, where the LOIA has been principally applied, to the economic detriment of oilfield operators, including Exxon.

SUMMARY OF ARGUMENT

Exxon supports the position of and arguments set forth by Gulf which urge that:

1. The LOIA is inconsistent with federal law and, as such, cannot be adopted as surrogate federal law governing operations on the OCS pursuant to the provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. §§1331-1356;

2. By enacting the OCSLA, Congress intended to preclude the states from attempting to control or regulate the development of minerals on the federal enclave; and

3. The LOIA is unconstitutional in that it violates the Contract Clause of the United States Constitution.

ARGUMENT

I. THE LOIA IS INCONSISTENT WITH APPLICABLE FEDERAL LAW AND THEREFORE CONNOT BE ADOPTED AS SURROGATE FEDERAL LAW GOVERNING OPERATIONS ON THE OCS.

The Constitution and laws of the United States extend to OCS land and artificial islands and installations attached thereto. 43 U.S.C.A. §1333(a)(1). The laws of the adjacent states are declared to be the laws of the United States, for purposes of the OCSLA, to the extent that they are applicable and not inconsistent with this sub-chapter or other federal laws. 43 U.S.C.A. §1333(a)(2)(A). Within the same section, in §1333(b), Congress incorporates the provisions of the Longshoremen's & Harbor Worker's Compensation Act (LHWCA), 33 U.S.C.A. §§901 - 950, with respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the OCS.

The LHWCA, as amended in 1984, contains provisions which permit reciprocal contractual indemnity between a vessel owner and the employer of an injured OCS worker. 33 U.S.C.A. §905(c). As noted by Gulf in its Petition for Writ of Certiorari at p. 18, Congress intended this provision to govern indemnity agreements on the OCS and preclude contrary state regulation. This Court has recognized in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), that according to the exclusive liability provision of the Federal Employees Compensation Act, 5 U.S.C §8116(c), which is analogous to §905(a) of the

LHWCA, a third party claim for contractual indemnity may be asserted against an employer.

Exxon submits that the LHWCA was intended to preempt the entire field of maritime worker's compensation and that its incorporation as part of the OCSLA does not in any way diminish the pervasiveness or comprehensiveness of its coverage. When Congres enacts constitutionally valid legislation addressing a particular subject matter of legitimate Federal concern, the states are precluded from enacting or enforcing statutes attempting to regulate the same subject matter by virtue of the Supremacy Clause. U. S. Const. Art. VI cl. 2. The intent to regulate a particular field is found where the statutory language or legislative history of an Act of Congress evidences a pervasive and comprehensive plan of federal regulation; where the legislation under review affects an area imbued with a dominant federal interest; or where the object and character of the congressional enactment reveal a purpose to occupy the field. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The dominance of the federal interest expressed in the LHWCA acts to circumscribe any power on the part of the states to enact laws attempting to regulate the same matters, even if the state law is intended to complement or supplement the federal scheme. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). The congressional purpose to preclude state legislation in areas covered by the LHWCA may be inferred from the completeness of the federal legislation. When the scheme of federal regulation is complete and pervasive, it is reasonable to infer that Congress left no room for the states to supplement it.[1]

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[1] *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919); *Coverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

Indeed, application of state laws purporting to address the matter of indemnification provisions in service contracts can only lead to irresolvable conflicts, confusion, and needless litigation. This has been the case with respect to the LOIA in which the Louisiana Legislature, with one stroke of the pen, enacted legislation which not only deprives private parties of substantive contractual rights, but attempts to circumvent application of federal law on the OCS.

Because such conflicts exist between federal and state law dealing with the same subject, the state law must yield to federal preemption.[2] We submit that there is no way to harmonize the LOIA with the comprehensive scheme of federal regulation mandated by Congress in the OCSLA and the provisions of the LHWCA, which have been held to permit not only contractual indemnity agreements, but also insurance related provisions collateral thereto. *Voisin v. ODECO Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984), *cert. den., Rig Hammers, Inc. v. ODECO Drilling, Inc.*, 53 U.S.L.W. 3669 (1985).

II. THE LOIA SUBSTANTIALLY FRUSTRATES NATIONAL POLICIES SOUGHT TO BE EFFECTUATED BY THE OCSLA AND SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

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[2] Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. This Court has held that a conflict will be found "...where compliance with both federal and state regulations is a physical impossibility..." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), *reh'g. denied*, 374 U.S. 858 (1963).

In enacting the OCSLA, Congress enunciated the policy that "[t]he OCS is a vital national resource reserve held by the Federal Government for the public, which should be made available for the expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs..." 43 U.S.C.A. 1332(3). It is recognized that the management of mineral exploration, developmant and production on the OCS is a matter of national interest. 43 U.S.C.A. 1332(4).

Although federal law was intended to govern all activities on the OCS, 43 U.S.C.A. §1333(a)(1), Louisiana has, by enacting the LOIA, attempted to participate in the regulation of such activities upon the OCS in a manner which is inconsonant with the strong national policy of establishing uniform federal regulation in this area.

Any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid.[3] This is true regardless of whether Congress specifically intended to preempt the particular state statute. Furthermore, it is well settled that a finding of substantial frustration may be based on an interference not apparent on the face of a statute.[4] Thus, it is not necessary that the LOIA evidence a direct conflict

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[3] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525-26 (1977), *reh'g. den.*, 431 U.S. 925 (1977), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Perez v. Campbell*, *402 U.S. 637, 652 (1971).*

[4] *See, e.g., Jones v. Ruth Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967); *Hill v. Florida*, 325 U.S. 538 (1945).

with any provision of the OCSLA. Rather the statute can and should be invalidated because it substantially frustrates the purpose of uniformity and efficient development of resources on the OCS. Such an intrusion in an area where federal law must be "the supreme law of the land" cannot be countenanced on the basis of state police power particularly within a geographic location beyond the borders of the state.

III. THE LOIA WORKS A SUBSTANTIAL IMPAIRMENT OF THE OBLIGATION OF CONTRACTS IN A MANNER VIOLATIVE OF ARTICLE 1, §10, OF THE UNITED STATES CONSTITUTION.

The blanket contract in the case at bar was executed on May 16, 1980, and specified effective dates "through May 16, 1972, and as long thereafter as necessity for same continues." Therefore, the work covered by the contract included jobs commenced both before and after the effective date of the LOIA, September 11, 1981.

Section I of the Act provides that its application specifically includes what is commonly referred to in the oil industry as master or general services agreements or blanket contracts in whatever form and by whatever name. The Act shall not apply to a contract which was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

It has been held that under Louisiana law, a contract is executed when all of the acts necessary to render it a binding obligation are completed. *Page v. Gulf Oil Corporation,* 775 F.2d 1311 (5th Cir. 1985). Thus the *Page* court

held that the agreement became effective only upon Gulf's notice or request for services; in other words when Gulf requested, and its contractor responded by supplying service and equipment. The record in the instant matter does not indicate the effective date of the agreement under a *Page* analysis, but rather provides a holding that the Act applies to the instant agreement because it applies to work to be performed in the future. Exxon submits that the continued vitality of such a holding will permit the LOIA to be applied retroactively in a manner that is violative of the Contract Clause of the United States Constitution.

In Contract Clause analysis, the first inquiry is whether the State law has, in fact, operated a substantial impairment of a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), *reh'g. den.*, 439 U.S. 886 (1978). It is clear that the LOIA effects such an impairment. The LOIA nullifies all oilfield indemnity contracts, waivers of subrogation, additional named insured endorsements and any form of insurance protection. The LOIA prohibits private parties from allocating the risks of a venture and responsibility of the procurement of insurance.

When an agreement is reached requiring a contractor to provide insurance coverage, the acceptance of this obligation on the part of the contractor is reflected in the price paid by the oilfield operator. The contractor, in turn, pays a premium to the insurance company underwriting the risk and typically provides the oilfield operator with proof of insurance. The application of the LOIA to indemnity agreements and insurance contracts collateral thereto, can create a windfall for the insurance company. Such windfall would be at the expense of the oilfield operator

who may find itself either paying twice, or without any insurance at all. We submit that such obliteration of insurance related contractual provisions constitutes a substantial impairment of contract.

The contractual impairment occasioned by the LOIA does not further any important public purpose, and in any event is an unnecessary and unreasonable means even to a legitimate end. In considering whether a state's impairment of contractual obligations is constitutional, the height of the hurdle the state legislation must clear is determined by the degree of impairment. *Allied Structural Steel*, 438 U.S. 234, 245. Severe impairment, as in the case of the LOIA as applied to contracts for services upon the OCS, demands a careful examination of the nature and purpose of the state legislation. *Id.*

In determining whether the end sought to be achieved by a state legislature justifies the impairment of a contractual obligation, this Court has focused on two criteria: first, whether the legislation was enacted because of an "emergency"; and second, whether the legislation was "addressed to a legitimate end," that is, whether it was "for the mere advantage of particular individuals or for the protection of a basic interest of society." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 444-45 (1934); *Allied Structural Steel*, 438 U.S. 234, 242.

The LOIA does not purport to be enacted in response to any emergency situation. No such finding was or could have been made by the Louisiana legislature in its promulgation of this Act. Nor does the LOIA address a legitimate end or further an important general societal

interest. While the drafters of the Act purport to concern themselves with rectifying perceived inequities "foisted on" certain oilfield service contractors, the real beneficiary of the Act, as noted above, may well be the insurance company who has been paid a premium to underwrite the risk, but whose obligation has been nullified by the provisions of the LOIA.

Assuming *arguendo* that the legislature sought to achieve a legitimate end in enacting the LOIA, the constitutional inquiry is not at an end. The means adopted by the Louisiana Legislature in enacting the LOIA were not reasonable or necessary to serve an important public purpose.[5]

Lower courts, in scrutinizing the LOIA, have upheld it on the basis that it promotes safety in the oilfield. Beginning with *Bryant v. Platform Well Service, Inc.* 563 F.Supp. 760 (E.D.La. 1983), the purpose of the LOIA was acknowledged as being, in large part, to emphasize safety in the oil industry. As stated by the Fifth Circuit in *Knapp v. Chevron,* 781 F.2d 1123 (5th Cir. 1986),

> If a person is permitted to insulate himself from his own negligence, the motivation to institute and enforce safe work practices and conditions is at best attenuated. One who remains liable and exposed for his own negligence is more likely to act with care. The Act is a rational attempt to improve oilfield safety. (Citations omitted) 781 F.2d 1123, 1130.

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[5] Legislation modifying contractual rights and obligations must use means that are (1) "necesary" to serve the "important public purpose" and, (2) "reasonable" in their terms and conditions. *United States Trust Company v. New Jersey,* 431 U.S. 1, 25, *reh'g. den.,* 431 U.S. 975 (1977).

Exxon submits that to permit the contractor/indemnitor to escape liability for *its own fault* as much violates this purpose as to allow the indemnitee to do the same. The LOIA is now being construed to go much farther than simply rendering the oil company/indemnitee accountable for its own fault. It is currently being invoked as a vehicle to totally insulate the contractor/indemnitor from any liability *for its own* fault.[6] This is an absurd result to be reached under a statute arguably designed to enhance safety.[7]

Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by a mere assertion in the preamble of a law. When it is shown that state action threatens signigicantly to impair constitutionally protected freedom, judicial inquiry must be made to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose aserted as its justification. *Bates v. City of Little Rock,* 361 U.S. 516

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[6] Because the contractor/employer is fully immune from direct tort liability by virtue of the provisions of the LHWCA, the plaintiff would not assert his employer's negligence in his tort claim, even if it was the actual cause of the injury. See e.g., *Meloy v. Conoco, Inc.,* 784 F.2d 1320 (5th Cir. 1986); *petition for rehearing granted and questions certified to La. Supreme Court,* (5th Cir. July 18, 1986) (No. 84-4718); *Durant v. Chevron, U.S.A., Inc.,* 613 F.Supp. 1189 (E.D. La. 1985); *Moser v. Aminoil U.S.A. Inc.,* 618 F.Supp. 774 (W.D. La. 1985); *Aucoin v. Pelham Marine, Inc.,* 593 F.Supp. 770 (W.D. La. 1985).

[7] As a practical matter, the contractor is generally in the best position to prevent job-related accidents because of the control it retains over its own particular operations. The contractor is being paid to be on location and to actually supervise the activities of the OCS worker. A very limited number of oil company representatives, on the other hand, are present to coordinate the efforts of various crews of contract employees, but are not in a position to involve themselves in the actual accomplishment of the specialty work which has been contracted out.

(1960). Exxon submits that the LOIA does not meet this constitutional standard.

CONCLUSION

Exxon supports the Petition for Writ of Certiorari of Gulf in this cause. Although we have concentrated our arguments in the areas of preemption, frustration of federal policies, and impairment of contracts, we do not wish to minimize the importance of other substantial federal and constitutional questions presented by Gulf.

For the foregoing reasons, as well as those expressed by Petitioner Gulf, Exxon respectfully requests this Court to grant the Writ of Certiorari sought by Gulf Oil Corporation in this cause.

Respectfully Submitted,
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